No. 85-782

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LUZ MARINA CARDOZA-FONSECA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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The United States has recognized the phrase "well-founded fear of persecution" as an element of "refugee" status since 1968, when the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, and that phrase has been construed in this country since 1973 (*In re Dunar*, 14 I. & N. Dec. 310 (Board of Immigration Appeals 1973)). It has been a part of U.S. statutory law since passage of the Refugee Act of 1980 (the Act), Pub. L. No. 96-212, 94 Stat. 102 *et seq.* Both before and after passage of the Act, the Board of Immigration Appeals determined that there is no meaningful or practical distinction between "well-founded fear of persecution" and the likelihood or clear probability standard under Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h). *In re Dunar, supra; In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985) (Pet. App. 29a-68a); see *INS* v. *Stevic*, 467 U.S. 407, 418-420

(1984) (discussing *Dunar* and its progeny).[1] The Board, of course, reached that interpretation by analyzing the Protocol and the legislation and by applying its expertise in the application of verbal formulations to the actual facts of refugee cases (see Gov't Br. 11, 29-30). This Court's precedents require that that longstanding interpretation be accepted unless it is unreasonable, even if some other interpretation of the statute might seem "more natural" to some observers. *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 6.[2] Respondents and amici have not come close to showing that the agency's interpretation of the statute is unreasonable.

1. Respondent first argues that the Court should begin and end its inquiry by looking to the "plain language" of the Act (Resp. Br. 5-10; see also IHRLG Br. 12-14). But the language of the Act is far from plain. "Well-

[1] This Court held in *Stevic* that the likelihood or clear probability standard under Section 243(h) means that the alien must show that persecution is more likely than not (467 U.S. at 424).

[2] Respondent and amici offer only insubstantial arguments in asking this Court to depart from its usual policy of deference. Respondent claims (Br. 38-40) that deference is appropriate only when Congress has "delegated" the interpretative task to the agency. This Court's precedent, however, is to the contrary. See, *e.g.*, *Community Nutrition Institute* (deferring to Secretary's determination whether statute required or merely authorized him to follow certain procedures). Amici curiae International Human Rights Law Group et al. (IHRLG) argue that deference is inappropriate in the present case because the agency's interpretation predates the Refugee Act of 1980, and that failure to change that interpretation after passage of the Act shows agency recalcitrance (IHRLG Br. 9, 20-22). That argument, of course, begs the question whether the Act was intended to alter the prior interpretation. As we showed in our opening brief (at 25-28), the legislative history demonstrates congressional acceptance of prior agency interpretation of "well-founded fear." And, even if "the legislative history [were] not unambiguous, it certainly [would be] no support for assertions that the [BIA's] interpretation of § [208] is insufficiently rational to warrant our deference." *Community Nutrition Institute*, slip op. 9.

founded fear of persecution" is a term of art with a history of administrative and judicial interpretation, and Congress's intention was that it be construed by reference to past usage, not by reference to a dictionary. Nonetheless, dictionary definitions of "well-founded" are consistent with the construction that the agency has long followed. The concepts of " 'based on good or sure grounds or reasons' " (Resp. Br. 8 (quoting 12 *Oxford English Dictionary* 295 (1933)) and "ha[ving] a firm foundation in fact" (*In re Acosta-Solorzano*, Pet. App. 51a (citing *Webster's Third New International Dictionary* 2925 1976)) are themselves subject to interpretation and could well be interpreted to mean that a fear, to be well founded, must be more likely of realization than not.

In a related argument, respondent asserts that "well-founded fear of persecution" must mean something different from the Section 243(h) standard simply because the words "well-founded fear of persecution" are not used in Section 243(h) (Resp. Br. 8-9, 46; see also United Nations High Commissioner of Refugees (UNHCR) Br. 5-6). It is true that there is a general presumption that different words used in different sections of a statute have different meanings. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). But that general presumption is not irrebuttable, and we have shown in our opening brief that there is abundant reason to believe that Congress chose different words to express equivalent concepts in Sections 208 and 243(h). The general presumption of *Russello* does not suffice to overturn the agency's consistent determination that "well-founded fear of persecution" is in practical application the same as a likelihood or clear probability of persecution.

2. Respondent correctly points out that asylum and withholding of deportation substantially differ from one another (Resp. Br. 10-11, 44-45).[3] Respondent suggests

[3] Some amici, however, have missed this fundamental point. They confuse asylum with *nonrefoulement* when they contend that the asylum provisions of the Act were intended to bring the United

that it must follow that a different (and more generous) standard of eligibility applies to asylum. Quite the contrary, the more extensive relief given an asylee contradicts any notion that eligibility standards for asylum could be more encompassing than eligibility standards for withholding of deportation (see Gov't Br. 18-22).

Respondent contends that, because the Attorney General has discretion to deny asylum to persons with a well-founded fear of persecution, Congress could have intended to make asylum available on the basis of a lower threshold showing than that required for the lesser benefit of withholding of deportation (Resp. Br. 46-47; see also IHRLG Br. 24-27). The fallacy of that argument was shown in our opening brief (at 21-22 & n.15). As we said there, Congress could not have intended to create a class of aliens who had a "well-founded fear"—but not a likelihood—of persecution, some of whom the Attorney

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States into conformity with its obligations under the Protocol (see UNHCR Br. 6-7, 25; Lawyers Committee for Human Rights et al. (LCHR) Br. 30-31, 38-39). Under the Act, and in international usage, "asylum" entails a possibility of lawfully remaining in the country of refuge, not just a right not to be returned to the country of probable persecution. See 8 U.S.C. 1159(b); G. Goodwin-Gill, *The Refugee in International Law* 225 (1983). The obligation of the United States under the Protocol is one of *nonrefoulement, i.e.*, not to return the alien to the country of probable persecution, and that is precisely the relief granted by withholding of deportation. See *INS* v. *Stevic*, 467 U.S. 407, 429-430 n.22 (1984). Neither the United States nor any other nation has any international obligation whatsoever to grant asylum. G. Goodwin-Gill, *supra*, at 103-104, 107, 119, 121, 225. Respondent generally recognizes the distinction between our *nonrefoulement* obligation and our lack of any international obligation to grant asylum (Resp. Br. 6 & n.1, 13 n.9, 47). At one point, however, respondent joins amici in the incorrect suggestion that the statutory asylum provisions—as opposed to other portions of the Act—were intended to achieve conformity with the Protocol (Resp. Br. 12-13). The asylum section does condition eligibility on status as a "refugee" under Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), which is derived from the Protocol, but it does not correspond to any *obligation* under the Protocol.

General might return to a country in which they would have such good reason to fear persecution, while granting others asylum despite their ineligibility for withholding of deportation.[4] But Congress could have intended to—and did—create a system in which a likelihood of persecution is both necessary and sufficient to *require* withholding of deportation and to make the alien eligible for the additional benefits of asylum, if granted in the Attorney General's discretion.[5]

3. Respondent agrees with us that the "well-founded fear" language in the Act is taken from the Protocol and the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (Resp. Br. 11-18). We showed in our opening brief (at 22-28) that the Protocol's well-founded fear standard had a settled interpretation in U.S. law by 1980, and that Congress intended that interpretation to be continued. Respondent, however, urges the Court to disregard the authoritative U.S. interpretation of the Protocol that existed in 1980, asserting three bases for her argument that the Act modified that interpretation. None withstands scrutiny.

First, respondent claims (Br. 15) that "no uniform practice had * * * existed [before the Act] for the treatment of refugees under the United Nations definition." That is true, in the sense that refugees were admitted to the United States under three different procedures before the Act. It was that absence of a uniform practice that Congress observed (see Gov't Br. 12-13 & n.6). That

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[4] See also T. Aleinikoff & D. Martin, *Immigration Process and Policy* 666 (1985).

[5] Thus, amici err in arguing that we have ignored the discretion of the Attorney General under Section 208 or that our reading of the statute would render Section 243(h) superfluous (IHRLG Br. 25-27). The Attorney General's discretion under Section 208 is of vital importance in determining which refugees, among those for whom withholding of deportation is mandatory, will be granted asylum, which can lead to permanent residence, and which ones may instead be deported to a country other than the one where they face persecution.

observation has nothing whatsoever to do with the uniformity of interpretation of the Protocol definition.

Second, respondent (Br. 15-16) characterizes our argument as one of "silent ratification" of the INS's 1979 asylum regulations (8 C.F.R. Pt. 108 (1980)), which equated "well-founded fear" under the Protocol with "likelihood of p secution" (44 Fed. Reg. 21253, 21257 (1979)).[6] But the interpretation that Congress ratified is not found in the 1979 regulations alone, but in *In re Dunar*, *supra*, and other administrative and judicial decisions discussed in our opening brief.[7] Nor does our argument depend on congressional silence. Far from being silent, Congress chose to use in the statute the

[6] Amici attack the 1979 regulations by ignoring the INS's reasoning (IHRLG Br. 20-21 & n.8). Amici suggest that the INS never explained its basis for asserting in the discussion accompanying the 1979 regulations that "well-founded fear" was the semantic equivalent of other formulations used in the regulations, but in fact the INS explained (44 Fed. Reg. 21257) that it was relying on *In re Dunar*, *supra*. And amici mischaracterize the regulations when they assert that the INS "rejected" the well-founded fear standard (IHRLG Br. 53). The words "well-founded fear" did not appear in 8 C.F.R. 108.3(a) (1980) because the INS treated that standard as equivalent to a likelihood standard, not because any standard was rejected.

[7] Respondent seeks to belittle *Dunar* and cases following it on the ground that *Dunar* was not an asylum case (Resp. Br. 41, 42 n.35). That is beside the point. *Dunar* was the watershed case interpreting "well-founded fear of persecution" as used in the Protocol (see *Stevic*, 467 U.S. at 418-420), and it is the Protocol definition that Congress has made applicable to asylum claims. There is also no substance to respondent's argument that the BIA has "vacillated" in its interpretation of "well-founded fear" (Resp. Br. 42-43). The BIA has consistently applied a "likelihood" test, as shown by the very quotations in respondent's brief. That the BIA has sometimes used varying phrases in holding that certain aliens were or were not likely to suffer persecution shows only that there are many ways of expressing the same concept, not that different standards have been applied in different cases. Cf. *Stevic*, 467 U.S. at 424 n.19 ("clear probability" and "likelihood" are interchangeable standards); *id.* at 429-430 ("more likely than not" is same standard as "clear probability of persecution").

words "well-founded fear of persecution," whose U.S. interpretation Congress must be presumed to have known. See *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). And the legislative history shows acceptance of that interpretation, not just through the complete absence of complaint about that interpretation, but affirmatively through the Senate Report and the hearing testimony of an administration witness (see Gov't Br. 26).[8] Respondent ignores these parts of the legislative history; amici offer contradictory arguments for disregarding the Senate Report[9] and plainly incorrect arguments for disregarding Mr. Martin's testimony.[10]

[8] That witness, David Martin, is a former State Department official who was deeply involved in the Department's work on the Act (see Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 Mich. Y.B. Int'l Legal Stud. 91, 91 n.*) and a coauthor of a leading text (T. Aleinikoff & D. Martin, *supra* note 4).

[9] The Senate Report stated that "[t]he substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees." S. Rep. 96-256, 96th Cong., 1st Sess. 9 (1979). IHRLG et al. argue that this statement is "plainly inapposite" because the Senate bill was not adopted (IHRLG Br. 57 n.35). UNHCR argues, however, that this statement accurately describes the legislation that was passed and that the "substantive standard" mentioned is the Protocol definition, not the U.S. interpretation of that definition (UNHCR Br. 8). What the Senate Report plainly said was that asylum would *continue* to be granted under the Protocol definition, which was found in both the Senate bill and the House bill eventually enacted. The Report unmistakably endorsed past U.S. practice of granting asylum under the Protocol definition and stated that use of the Protocol definition in the Act would not change the substantive standard.

[10] Mr. Martin's testimony was that, "[*f*]*or purposes of asylum*, the provisions in this bill do not really change the standards." *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (emphasis added). Amici imply that Mr. Martin's 1979 testimony used the word "asylum" to refer to conditional entry under old Section 203(a)(7), 8 U.S.C. (1976 ed.) 1153(a)(7) (IHRLG Br. 58 n.35). Mr. Martin, however, well

Third, respondent relies on a statement by Senator Kennedy that she reads as critical of the interpretation of "well-founded fear" used in the 1979 regulations (Br. 17; see also IHRLG Br. 55-56). But Senator Kennedy said nothing about the well-founded fear standard. His remarks, in context, show that Congress's goal in providing for statutory asylum was to ensure uniformity in U.S. asylum practice by changing the "procedures." [11]

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understood the distinction between asylum and the quota system of conditional entry. See T. Aleinikoff & D. Martin, *supra* note 4, at 618; Martin, *supra* note 8, 1982 Mich. Y.B. Int'l Legal Stud. at 93, 109-110, 112. Another administration witness had just explained to Congressman Fascell that the bill provided considerably broader means of entry into the United States than Section 203(a)(7), because it eliminated ideological and geographic restrictions. The point Mr. Martin added was that, although the bill in that respect broadened the standards that had been used for conditional entry, it did not broaden the standards that had been used for asylum.

UNHCR points out (Br. 8) that Mr. Martin later testified before Congress that problems relating to asylum did not become fully apparent until after the Refugee Act of 1980 was in place. Mr. Martin's 1981 testimony, however, supports our position. Mr. Martin pointed out that, although the language of the "well-founded fear" standard might appear broad to some, "U.S. case law and international practice in applying this particular standard * * * demonstrate that it is, in fact, a narrow standard" that should be "reaffirmed." *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 127 (1981) [hereinafter *1981 Senate Hearings*]. The case law to which Mr. Martin referred was *Fleurinor* v. *INS*, 585 F.2d 129, 133 (5th Cir. 1978), and *Kashani* v. *INS*, 547 F.2d 376, 379 (7th Cir. 1977), which are discussed in our opening brief. See Martin, *supra* note 8, 1982 Mich. Y.B. Int'l Stud. at 113, 122 n.99.

[11] Senator Kennedy's statement reads: "It is the intention of the Conferees that the Attorney General should immediately create a *uniform procedure* for the treatment of asylum claims filed in the United States or at our ports of entry. *Present regulations and procedures* now used by the immigration Service simply do not conform to either the spirit or to the new provisions of this Act." 126 Cong. Rec. 3757 (1980) (emphasis added).

There is no evidence that Congress had any quarrel with the likelihood standard previously applied to regulatory asylum claims. Senator Kennedy had earlier remarked that "Section 207(b) [which became Section 208] *improves and clarifies the procedures* for determining asylum claims filed by aliens who are physically present in the United States" (125 Cong. Rec. 23233 (1979) (emphasis added)), and *procedural* reform of the 8 C.F.R. Pt. 108 (1980) regulations was a theme of both the Senate Report and the House Report.[12] The Senate Report reiterated Senator Kennedy's reference to what eventually became Section 208 as "improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States" and stated in the very next sentence that the substantive standard was not changed. S. Rep. 96-256, 96th Cong., 1st Sess. 9 (1979). The House Report confirmed that Congress's aim was simply to provide a "statutory basis" for *existing* "United States asylum policy," which the House Report noted was then governed by the regulations at 8 C.F.R. Pt. 108 (1980). H.R. Rep. 96-608, 96th Cong., 1st Sess. 17 (1979).

4. Respondent claims that Congress, in creating the asylum provision, intended to retain refugee admission standards in prior refugee statutes, which she contends were more generous than the "likelihood" standard (Resp. Br. 18-21; see also IHRLG Br. 30-41). A fair reading of the legislative history refutes that contention.

a. The House Report on the Refugee Act of 1980, in a section labeled "background," discussed refugee laws

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[12] Section 208 does in fact significantly change the procedures for grant of asylum. Under 8 C.F.R. 108.1 (1980), the only aliens within the United States who could apply for asylum in advance of a deportation or exclusion proceeding were those who were maintaining a lawful status within the United States or whose presence in the United States was authorized. Section 208(a), 8 U.S.C. 1158(a), requires the Attorney General to "establish a procedure for an alien physically present in the United States * * *, *irrespective of such alien's status*, to apply for asylum" (emphasis added).

that were in force between 1948 and 1965. H.R. Rep. 96-608, *supra*, at 2-3. Not a word of the legislative history suggests that the definitions of "refugee" contained in those special relief Acts was to be carried over into the new legislation. For that reason, respondent's reliance on pre-1964 legislation is misplaced (Resp. Br. 19-20; see also IHRLG Br. 31-36). Moreover, very limited relief was made available to refugees under those Acts, and it is for that reason that the few reported decisions construing them may have given a broad construction to their definitions of "refugee." For example, Section 6 of the Refugee Relief Act of 1953, 67 Stat. 403, required only that the alien unable to return home to an Iron Curtain country because of "persecution or fear of persecution" not be deported until after the Attorney General brought his case to Congress's attention; and it affirmatively required that he be deported notwithstanding his persecution or fear of persecution unless both Houses of Congress passed a concurrent resolution approving the grant of permanent residence.[13]

b. There is even less basis for respondent's reliance on former Section 203(a)(7), which was added to the

[13] See *Cheng Fu Sheng* v. *Barber*, 269 F.2d 497, 498-500 (9th Cir. 1959). The other cases cited by respondent and amici are not a definitive interpretation that even the pre-1965 legislation required less than a showing of likelihood of persecution, let alone an interpretation of the 1967 Protocol or the 1980 legislation. In *Lavdas* v. *Holland*, 139 F. Supp. 514 (E.D. Pa. 1955), aff'd, 235 F.2d 955 (3d Cir. 1956), and *Mascarin* v. *Holland*, 143 F. Supp. 427 (E.D. Pa. 1956), the courts simply determined that each alien lacked even a reasonable basis to fear persecution; they did not set a standard for other cases. *United States ex rel. Fong Foo* v. *Shaughnessy*, 234 F.2d 715 (2d Cir. 1955), was a Section 243(h) case, and Judge Frank expressly equated that Section's standard with the "fear of persecution" standard in the 1948 and 1953 legislation (234 F.2d at 718 n.2). Therefore, if it were relevant, *Fong Foo* would support our position that there is only one standard for refugee admissions. To the extent that *Fong Foo* suggested that the uniform standard is less than a likelihood or clear probability of persecution, it is inconsistent with *Stevic*.

Immigration and Nationality Act in 1965 (Pub. L. No. 89-236, § 3, 79 Stat. 913), as a guide to the meaning of Section 208 (Resp. Br. 20; see also IHRLG Br. 36-41, 56-57). Congress's concern in 1980 was to *replace* the piecemeal approach to the admission of refugees, which was accomplished under former Section 203(a)(7) (conditional entry) and former Section 212(d)(5), 8 U.S.C. (1976 ed.) 1182(d)(5) (parole), and 8 C.F.R. Pt. 108 (1980) (asylum for aliens physically in the United States), with a systematic scheme for the admission of refugees. *INS* v. *Stevic*, 467 U.S. at 425 (citing legislative history). In this regard, Congress repealed Section 203(a)(7), restricted the use of parole for the admission of refugees (8 U.S.C. 1182(d)(5)(B)), and provided a statutory basis for the consideration of "asylum" applications under the 8 C.F.R. Pt. 108 (1980) regulations. To the extent that Congress sought to preserve a substantive standard from among the three procedures previously used for refugee admissions, it sought to preserve the regulatory asylum standard of Part 108, not the conditional-entry standard of Section 203(a)(7).[14]

As we pointed out in our opening brief (at 12-13, 27), Section 207 (8 U.S.C. 1157) and Section 208 as added

[14] The House explicitly noted that it intended to provide a statutory basis for the Part 108 regulatory asylum policy (H.R. Rep. 96-608, *supra*, at 17). The Senate also had regulatory asylum rather than conditional entry in mind when it referred to improving the procedures but maintaining the substantive standard for determining "asylum claims filed by aliens who [were] physically in the United States" (S. Rep. 96-256, *supra*, at 9). As Congress surely knew, conditional entry was predominantly used for refugee admissions from abroad, not for aliens physically in the United States. Statistics kept by the Immigration and Naturalization Service show that 44,488 aliens were admitted from abroad under former Section 203(a)(7) between July 1975 and September 1979, whereas only 2584 were "admitted" under that provision on the basis of adjustment-of-status applications by aliens who were in the United States. Conditional entry and parole were understood by Congress as the vehicles for bringing refugees into this country from abroad. See H.R. Rep. 96-608, *supra*, at 3-4.

by the 1980 legislation make asylum potentially available to a large number of refugees who were ineligible for conditional entry because of Section 203(a)(7)'s geographic and ideological restrictions. In addition, because of those restrictions and tight numerical limitations on the number of aliens admitted under Section 203(a)(7), the majority of refugees who entered the United States before 1980 did so under the Attorney General's discretionary Section 212(d)(5) "parole" authority.[15] Parole was and is a temporary, limited form of relief that "shall not be regarded as an admission of the alien" (8 U.S.C. (1976 ed.) 1182(d)(5); 8 U.S.C. 1182(d)(5)(A)). Sections 207 and 208 make the comprehensive benefit of asylum potentially available by statute to refugees who, because of the restrictions in Section 203(a)(7), would have been denied statutory relief altogether or given only the limited statutory benefit of parole, and in *that* sense they are considerably broader than Section 203(a)(7), as observed in the Senate Report (S. Rep. 96-256, *supra*, at 1, 4). But, contrary to amici's assertions (IHRLG Br. 31, 40-41 & n.21), the legislative history does not show and we have not conceded that "well-founded fear of persecution" as used in the 1980 legislation is as broad a phrase as "fear of persecution" as used in Section 203(a)(7). The most reliable guides to the meaning that Congress assigned to "well-founded fear of persecution" are prior U.S. interpretations of that phrase as used in the Protocol, not prior interpretations of "fear of persecution" as used in Section 203(a)(7).

Even so, it appears that an alien proceeding under Section 203(a)(7) did indeed have the "burden of demon-

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[15] *Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearings Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong. 1st Sess. 10 (1979); S. Rep. 96-256, *supra*, at 1-2, 5-6; H.R. Rep. 96-608, *supra*, at 2, 4, 11.

strating the likelihood of persecution," *i.e.*, the burden of meeting the Section 243(h) standard. *Ishak* v. *District Director*, 432 F. Supp. 624, 626 (N.D. Ill. 1977). Although one District Director once said that an applicant had "offered no credible testimony or other evidence that he was persecuted or had good reason to fear persecution" (*In re Ugricic*, 14 I. & N. Dec. 384, 385-386 (1972)), such a statement hardly amounts to a holding that "good reason" was all an applicant had to show in order to be eligible for conditional entry, or that "good reason" is a lesser standard than likelihood or clear probability. And the Board of Immigration Appeals never had jurisdiction over Section 203(a)(7) determinations (see *Stevic*, 467 U.S. at 416 n.8), so the Board never determined the appropriate standard under Section 203(a)(7).[16]

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[16] See *In re Acosta-Solorzano* (Pet. App. 42a-43a). The Board did comment in two Section 243(h) cases on the lack of identity between that Section and Section 203(a)(7), but never did it say that the test of "persecution or fear of persecution" under Section 203(a)(7) was less stringent than a likelihood or clear probability of persecution as required under Section 243(h). The thrust of *In re Tan*, 12 I. & N. Dec. 564 (1967), was the then-discretionary nature of the determination required of the Attorney General under Section 243(h) concerning whether the alien would be subject to persecution in his own country (see *In re Tan*, 12 I. & N. Dec. at 566, 568-569). It was the existence of that element of discretion that led the Board to reject the claim (*id.* at 569-570) "that an alien deportee is required to do no more than meet the standards applied under section 203(a)(7) of the Act when seeking relief under section 243(h)." See also *In re Janus & Janek*, 12 I. & N. Dec. 866, 876 (1968). And in *In re Adamska*, 12 I. & N. Dec. 201, 202 (1967), the Regional Commissioner observed only that Section 203(a)(7)'s standard was broader than the "would be subject to physical persecution" standard of the *pre-1965* version of Section 243(h) (8 U.S.C. (1964 ed.) 1253(h)). *Adamska* tells us nothing about the relationship between Section 203(a)(7) and the post-1965 version of Section 243(h), which the Board recognized was broader than the pre-1965 version (*In re Janus & Janek*, 12 I. & N. Dec. at 876).

5. Despite the uniform interpretation of the Protocol phrase "well-founded fear of prosecution" in this country from 1973 until passage of the Refugee Act, respondent urges the Court to forsake that interpretation in favor of a de novo examination of the negotiating history of the Convention or interpretations reached by international bodies or foreign courts (Br. 24-27 & n.20; see also IHRLG Br. 44-52; UNHCR Br. 1130; LCHR Br. 33-64). There is no sufficient basis for the Court to do so. In any event, the negotiating history and other countries' interpretations of the phrase are consistent with the U.S. interpretation.

a. The meaning placed on the term "well-founded fear" by the United Nations Ad Hoc Committee that drafted the refugee provision, which eventually became Article 1 of the Convention—"good reason" to fear persecution—is itself subject to interpretation.[17] Nothing in those two words is inconsistent with a likelihood standard. Indeed, a natural interpretation of the words "good reason"—and the interpretation adopted by the Board since it first had occasion to review the negotiating history (*In re Dunar*, 14 I. & N. Dec. at 319)—is that they are used to distinguish mere subjective fear from fear based on an objective likelihood of persecution.[18] The one standard that was indisputably rejected through use of the words "good reason" was the standard that respondent seems to endorse: that the alien need only show a

[17] United Nations Economic and Social Counsel, *Report of the Ad Hoc Committee on Statelessness and Related Problems* 39, U.N. Doc. E/1618, E/AC.32/5 (Feb. 17, 1950), *reprinted in* 11 U.N. ESCOR Annex (Agenda Item 32) at 11, U.N. Doc. E/1618 & Corr. 1 (1950).

[18] Like the Board in *In re Dunar*, the Seventh Circuit, in equating the "well-founded" and "clear probability" standards, stated that its interpretation of "well-founded" conformed with the understanding of the United Nations Ad Hoc Committee, which had drafted the definition of "refugee." *Kashani* v. *INS*, 547 F.2d 376, 379 (1977).

"plausible account" of persecution. See United Nations Economic and Social Council, *Draft Report of the Ad Hoc Committee on Statelessness and Related Problems* 33-34, U.N. Doc. E/AC.32/L.38 (Feb. 15, 1950); *Acosta-Solorzano* (Pet. App. 49a n.11).[19] In sum, as stated by the Board in *Acosta-Solorzano*: "To the extent that such words ['good reason'] could be interpreted to mean that an alien's fear of persecution need only be plausible, they do not reflect the generally understood meaning of 'well-founded'" (Pet. App. 53a).

A leading authority on international refugee law, Atle Grahl-Madsen, has confirmed that "good reason" to fear persecution as used in the negotiating history means something more objective than a mere plausible account. "'[G]ood reasons' may relate to any set of circumstances which may serve as an indication of the *likelihood* of future persecution." 1 A. Grahl-Madsen, *supra* note 19, § 78, at 179 (emphasis added); see also *id.* at 181. Indeed, although it may be open to other readings as well, Grahl-Madsen's treatise in some places appears to endorse exactly the standard we suggest: "'Well-founded fear of being persecuted' may * * * be said to exist, if it is *likely* that the person concerned will become the victim of persecution if he returns to his country of origin" (*id.* § 76, at 175 (emphasis added); see also *Acosta-Solorzano* (Pet. App. 48a-49a)).

[19] Amicus UNHCR (Br. 16-20) has not shown why the drafters of the Convention definition of refugee substituted the "good reason" language for the words "plausible account." Furthermore, UNHCR does not claim that the words "good reason," or for that matter "well-founded" fear of persecution, were used to describe the International Refugee Organization definition of refugee (which UNHCR contends the drafters had no intention of changing). The new well-founded fear definition, together with the change in its description to "good reason," appear to have reflected a desire that a "more objective yardstick" be used to measure the claim to "refugeehood." See 1 A. Grahl-Madsen, *The Status of Refugees in International Law* § 76, at 173 (1966). The ordinary meaning of the phrase "well-founded," after all, is "good or sure grounds or reasons" and not simply "plausible account." See page 3, *supra*.

b. Amici are incorrect in their claim (LCHR Br. 33-39; UNHCR Br. 21-24) that this Court should look to the laws of other countries for an internationally accepted construction of the term "well-founded fear" or "refugee." In a case that does not involve any international obligations of the United States, but only incorporation in a domestic statute of the Protocol phrase "well-founded fear of persecution" (see note 3, *supra*), there is simply no authority for ignoring the consistent domestic construction of that phrase in favor of an interpretation by the domestic court of some foreign country. In enacting the Refugee Act of 1980, Congress expressed a desire not to alter the substantive standard for asylum, which depended on the domestic construction of "well-founded fear." Thus, when Congress stated that the new refugee definition would bring U.S. law into "conformity with the internationally-accepted definition of the term 'refugee'" set forth in the Protocol (H.R. Rep. 96-608, *supra*, at 9), it did not thereby intend to abdicate "construction" of the definition to non-U.S. sources that might have a different interpretation.

Nor does the *Handbook* cited by amici [20] provide authority for overriding the judgment of the Board of Immigration Appeals on this matter. *First*, although the *Handbook* may indeed be a useful source in many respects, the UNHCR acknowledges (*Handbook* 1) that "[t]he assessment as to who is a refugee, *i.e.*, the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee finds himself at the time he applies for recognition of refugee status." Under general principles of international law, only the parties to a treaty can authoritatively interpret its provisions. See *Draft Convention on the Law of Treaties*,

[20] Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva 1979) [hereinafter *Handbook*].

29 Am. J. Int'l L. Supp. 654, 973 (1935). Although the parties may entrust that interpretative power to some other state or body by agreement, the parties to the 1951 Convention and 1967 Protocol have not entrusted the interpretative power to the UNHCR.[21] *Second*, the *Handbook* was published in 1979, six years after *Dunar*, and cannot be considered a sufficiently contemporaneous or authoritative interpretation of the Protocol to overturn the prior authoritative interpretation in this country. *Third*, to the extent that amici would have the Court read the *Handbook* as if it stood for the proposition that "well-founded fear" is essentially a subjective test rather than an objective test in which subjective fear may play a part, their argument is inconsistent with both U.S. and international authority. See *In re Dunar*, 14 I. & N. Dec. at 319; INS, *Draft Worldwide Guidelines for Overseas Refugee Processing* 8-9, 25 (Oct. 1985); 1 A. Grahl-Madsen, *supra* note 19, § 76, at 174.[22]

Finally, the glimpse into foreign law provided by amici (UNHCR Br. 24-25 nn.50-52, 29 & n.56; LCHR Br. 40-64) does not begin to show the kind of uniform

[21] The parties have agreed to resolution of certain disputes about interpretation of the Protocol by the International Court of Justice (Protocol Art. IV, 19 U.S.T. 6226), but that court has never construed the term "refugee." The UNHCR, by contrast, "is charged with providing international protection to refugees, and is required *inter alia* to promote the conclusion and ratification of international conventions for the protection of refugees, and to supervise their application" (*Handbook* 6). In light of this "protection" function, it is not surprising that the UNHCR takes opportunities to encourage especially generous construction of the term "refugee" in various nations.

[22] Furthermore, "it cannot be certain to what extent the position in the *Handbook* reflects concepts that are outside the strict definition of a 'refugee' under the Protocol" (*Acosta-Solorzano*, Pet. App. 43a-44a n.8), because the jurisdiction of the UNHCR extends beyond those who meet the Protocol definition (*id.* at 43a n.8; see Nafziger, *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 U. Mich. J.L. Ref. 165, 174 & n.37 (1984)).

foreign interpretation of the Protocol that would be required in order to call into question the consistent U.S. interpretation. Virtually none of the cited foreign decisions interprets the Protocol or Convention; virtually all interpret domestic constitutions and statutes. Moreover, some of the cited decisions, as described, appear to adopt "likelihood" of persecution as the substantive standard (see LCHR Br. 56-58 (France)), and, with two exceptions, none appears to have focused on whether "likelihood" was or was not the proper standard.[23] Those two exceptions are British decisions that in fact support the interpretation by the Board of Immigration Appeals.[24] Thus, there is no uniform foreign interpretation inconsistent with the U.S. interpretation. Moreover, the international practice in this area cannot be ascertained without giving significant attention to the practice of the

[23] The Canadian decision in *Kwiatkowski* v. *Minister of Manpower & Immigration*, 142 D.L.R.3d 385 (1982), discussed by LCHR (at 44-45), did not involve the question whether refugee status required that the applicant be more likely than not to suffer persecution. It involved the question whether the applicant was required to show that he was more likely than not to establish refugee status in order to obtain a redetermination hearing.

[24] In *Fernandez* v. *Government of Singapore*, [1971] 1 W.L.R. 987, the House of Lords interpreted an extradition statute in which the key phrase was that the applicant "might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions" (see LCHR Br. 53-54 n.9). The House of Lords held that that particular statute should not be interpreted to require a showing of "balance of probabilities." In *R.* v. *Immigration Appeal Tribunal ex parte Jonah*, CO/860/84 (Q.B. Feb. 11, 1985), the Tribunal had determined that a fear of persecution was not "well founded," as required by an immigration rule, by applying "a balance of probabilities" approach (see LCHR Br. Addendum Doc. 4, at 1, 3). The court declined to reverse on the basis of *Fernandez*, holding that any difference between "well-founded fear" and "balance of probabilities" was "semantic" and that the Tribunal had not "fall[en] into error of law" (LCHR Br. Addendum Doc. 4, at 4).

United States itself, for the United States has been in the forefront among nations in resettling refugees and granting asylum under the "well-founded fear" standard.[25]

6. Finally, we note that much of the discussion in our opponents' briefs is devoted to points that have nothing to do with the issue in this case. The narrow question decided below, and presented in the petition, is one of statutory construction: whether the burden of proving eligiblity for asylum under Section 208 is equivalent to the burden of proving eligibility for withholding of deportation under Section 243(h). The balance-of-interests approach discussed by the American Immigration Lawyers Association and the American Civil Liberties Union et al. (see also Resp. Br. 28 n.24; UNHCR Br. 24, 29 & n.56), usually applied under the Due Process Clause, has never been applied to the task of statutory interpretation, and, indeed, is fundamentally inconsistent with the search for congressional intent.[26] Furthermore, the purpose of this case is to determine whether the proper standard is the likelihood or clear probability standard, or instead the more amorphous standard that the Ninth Circuit has adopted and that immigration judges within that circuit are attempting to apply.[27] The purpose of

[25] Compare Bureau for Refugee Programs, U.S. Dep't of State, *World Refugee Report* 100-102 (Sept. 1986) (Table VI, showing 52,353 refugees and asylees acccepted in all of Europe and Canada combined in 1984 and 61,012 in 1985), with *id.* at 102-103 (Table VII, showing 84,154 refugees and asylees accepted in United States in 1984 and 70,583 in 1985).

[26] In addition, if that approach were proper and compelled rejection of our position in this case, it would have compelled a different result in *Stevic* as well, for the interests that these amici would have the Court balance are identical in the two cases.

[27] Respondent makes much of the fact that those judges are attempting to follow the Ninth Circuit's holding that a well-founded fear of persecution is "slightly less than" a clear probability of persecution (*Diaz-Escobar* v. *INS*, 782 F.2d 1488, 1492 (1986)).

this case is not to describe the types of evidentiary showings that may satisfy the standard that is adopted, and therefore this is not the occasion to determine what effect the difficulty of obtaining evidence might have on application of either the Section 208 standard or the Section 243(h) standard (see LCHR Br. 14-30; UNHCR Br. 23-24; Resp. Br. 27).

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed and the case remanded to that court for disposition under the standard that has been consistently applied by the Board of Immigration Appeals.

Respectfully submitted.

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But the fact that immigration judges are attempting in good faith to follow binding precedent does not make the Ninth Circuit's standard any less vague.

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